

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

SIMON WILLIAMS, JR.,

Plaintiff,

v.

ATTORNEY MICHAEL EVANS, *et al*,

Defendants.

Case No. C06-5288RBL-KLS

SECOND ORDER TO SHOW  
CAUSE REGARDING  
DEFICIENT COMPLAINT

This matter has been referred to Magistrate Judge Karen L. Strombom pursuant to 28 U.S.C. § 636(b)(1), Local Magistrates Rules MJR 3 and 4, and Rule 72 of the Federal Rules of Civil Procedure. The case is before the Court upon the Court's review of the complaint. After reviewing the complaint and the balance of the record, the Court finds and orders as follows:

On June 6, 2006, the Court issued an order informing plaintiff of certain deficiencies in his complaint. (Dkt. #9). That order, however, was returned as undeliverable on June 8, 2006. (Dkt. #12). On July 13, 2006, plaintiff filed a notice of change of address with the Court. (Dkt. #13). Accordingly, the Court hereby is issuing this second order to show cause to give plaintiff another opportunity to cure, if possible, the deficiencies in his complaint.

A complaint is frivolous when it has no arguable basis in law or fact. Franklin v. Murphy, 745 F.2d 1221, 1228 (9<sup>th</sup> Cir. 1984). When a complaint is frivolous, fails to state a claim, or contains a complete

1 defense to the action on its face, the court may dismiss an *in forma pauperis* complaint before service of  
2 process under 28 U.S.C. § 1915(d). Noll v. Carlson, 809 F.2d 1446, 1448 (9<sup>th</sup> Cir. 1987) (*citing* Franklin  
3 v. Murphy, 745 F.2d 1221, 1227 (9<sup>th</sup> Cir. 1984)).

4 To state a claim under 42 U.S.C. § 1983, a complaint must allege: (i) the conduct complained of  
5 was committed by a person acting under color of state law and (ii) the conduct deprived a person of a  
6 right, privilege, or immunity secured by the Constitution or laws of the United States. Parratt v. Taylor,  
7 451 U.S. 527, 535 (1981), overruled on other grounds, Daniels v. Williams, 474 U.S. 327 (1986). Section  
8 1983 is the appropriate avenue to remedy an alleged wrong only if both of these elements are present.  
9 Haygood v. Younger, 769 F.2d 1350, 1354 (9<sup>th</sup> Cir. 1985).

10 Plaintiff also must allege facts showing how individually named defendants caused or personally  
11 participated in causing the harm alleged in the complaint. Arnold v. IBM, 637 F.2d 1350, 1355 (9<sup>th</sup> Cir.  
12 1981). A defendant cannot be held liable under 42 U.S.C. § 1983 solely on the basis of supervisory  
13 responsibility or position. Monell v. New York City Dept. of Social Services, 436 U.S. 658, 694 n.58  
14 (1978). A theory of *respondeat superior* is not sufficient to state a section 1983 claim. Padway v.  
15 Palches, 665 F.2d 965, 968 (9<sup>th</sup> Cir. 1982).

16 A defendant has acted under color of state law if he “exercise[s] power ‘possessed by virtue of  
17 state law and made possible only because the wrongdoer is clothed with the authority of state law.’”  
18 Johnson v. Knowles, 113 F.3d 1114, 1117 (9<sup>th</sup> Cir. 1997) (quoting West v. Atkins, 487 U.S. 42, 49, 108  
19 S.Ct. 2250, 2255, 101 L.Ed.2d 40 (1988) (quoting United States v. Classic, 313 U.S. 299, 326, 61 S.Ct.  
20 1031, 1043, 85 L.Ed. 1368 (1941)). In general, private parties do not act under color of state law. Price v.  
21 State of Hawaii, 939 F.2d 702, 707-08 (9<sup>th</sup> Cir. 1991). A plaintiff may bring a claim against a private party  
22 under 42 U.S.C. § 1983, however, “who ‘is a willful participant in joint action with the State or its  
23 agents.’” Degrassi v. City of Glendora, 207 F.3d 636, 647 (9<sup>th</sup> Cir. 2000) (citing Dennis v. Sparks, 449  
24 U.S. 24, 27-28 (1980) (“Private persons, jointly engaged with state officials in the challenged action, are  
25 acting ‘under color’ of law for purposes of § 1983 actions.”)).

26 To establish such joint action, facts showing defendants “acted ‘under color of state law or  
27 authority’” must be alleged. Degrassi, 207 F.3d at 647 (citation omitted); United Steelworkers v. Phelps  
28 Dodge Corp., 865 F.2d 1539, 1540-41 (9<sup>th</sup> Cir. 1989) (to prove conspiracy between state and private  
parties under section 1983, plaintiff must show agreement or “meeting of the minds” to violate

1 constitutional rights). Plaintiff names attorney Michael Evans as a defendant, but fails to set forth facts  
2 showing defendant Evans was acting under color of state law or authority either as a state official or as a  
3 willful participant in joint action with the state or any of its agents.

4 In addition, plaintiff appears to be challenging the fact or duration of his confinement. However, a  
5 writ for *habeas corpus* “is the exclusive remedy for a state prisoner who challenges the fact or duration of  
6 his confinement and seeks immediate or speedier release.” Heck v. Humphrey, 512 U.S. 477, 481 (1994);  
7 Neal v. Shimoda, 131 F.3d 818, 824 (9<sup>th</sup> Cir. 1997). This is true even though a section 1983 claim is based  
8 on “the alleged unconstitutionality of state administrative action.” Preiser v. Rodriguez, 411 U.S. 475, 489  
9 (1973).

10 The United States Supreme Court, furthermore, has held that:

11 [I]n order to recover damages for allegedly unconstitutional conviction or imprisonment,  
12 or for other harm caused by actions whose unlawfulness would render a conviction or  
13 sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been  
14 reversed on direct appeal, expunged by executive order, declared invalid by a state  
15 tribunal authorized to make such determination, or called into question by a federal  
16 court’s issuance of a writ of habeas corpus, 28 U.S.C. § 2254.

17 Heck, 512 U.S. at 486-87. In other words, a claim for damages that relates to a conviction or sentence  
18 which “has *not* been so invalidated is not cognizable under § 1983.” Heck, 512 U.S. at 487 (emphasis in  
19 the original). In addition:

20 [W]hen a state prisoner seeks damages in a § 1983 suit, the district court must consider  
21 whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his  
22 conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff  
23 can demonstrate that the conviction or sentence has already been invalidated.

24 Id. Plaintiff has not shown, let alone claimed, that his conviction or sentence already has been invalidated  
25 by either court or executive order. In addition, as plaintiff specifically has requested that he be released  
26 from confinement and that his judgment and sentence be vacated, any judgment in his favor necessarily  
27 would imply the invalidity of his sentence. Accordingly, plaintiff’s claim may be considered only in a  
28 petition for writ of *habeas corpus* and should be dismissed with prejudice as frivolous.

Due to the deficiencies described above, the Court will not serve the complaint. Plaintiff shall file  
an amended complaint, curing, if possible, the above noted deficiencies, or show cause explaining why this  
matter should not be dismissed by **no later than August 17, 2006**. The amended complaint must carry the  
same case number as this one. If an amended complaint is not timely filed or if plaintiff fails to adequately  
address these issues, the Court will recommend dismissal of this action as frivolous pursuant to 28 U.S.C.

1 § 1915, and such dismissal will count as a “strike” under 28 U.S.C. § 1915(g).

2 Plaintiff is advised that an amended pleading operates as a *complete* substitute for an original  
3 pleading. See Ferdik v. Bonzelet, 963 F.2d 1258, 1262 (9<sup>th</sup> Cir. 1992) (citing Hal Roach Studios, Inc. v.  
4 Richard Feiner & Co., 896 F.2d 1542, 1546 (9<sup>th</sup> Cir. 1990) (as amended), *cert. denied*, 506 U.S. 915  
5 (1992). Thus, if plaintiff chooses to file an amended complaint, the Court will not consider his original  
6 complaint.

7 The Clerk is directed to send plaintiff the appropriate forms so that he may file an amended  
8 complaint. The Clerk is further directed to send a copy of this Order and a copy of the General Order to  
9 plaintiff.

10 DATED this 17th day of July, 2006.

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14 Karen L. Strombom  
15 United States Magistrate Judge  
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